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Supreme Court, U. S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MATTHEW MASELLI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF CONNECTICUT

SUE L. WISE
JOHN R. WILLIAMS
Williams & Wise
265 Church Street
New Haven, Conn.
(203) 562-9931

Counsel for Petitioner

November , 1980

QUESTIONS PRESENTED

1. In a murder trial in which the defendant is the sole witness to the killing and in which the defendant's testimony is crucial to the sole issue of self-defense, does a jury instruction to "consider the importance to the accused of the outcome of the trial" and to consider the defendant's "obvious interest in the verdict," unconstitutionally discredit the testimony of the defendant, undermine the presumption of innocence, and violate the Due Process Clause of the Fourteenth Amendment?

2. In a murder case where the defendant is convicted of the lesser included offense of first degree manslaughter, an essential element of which is the specific intent to cause serious physical injury, does the jury instruction, "every person is presumed to intend the natural and necessary consequences of his acts," deny the defendant due process of law and conflict with this Court's decision in Sandstrom v. Montana, 442 U.S. 510 (1979)?

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NO.

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STATE OF CONNECTICUT,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, Matthew Maselli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of Supreme Court of the State of Connecticut entered in this proceeding on August 12, 1980.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported in Vol. XLII Connecticut Law Journal, No. 7, August 12, 1980, pp. 15-19 and appears in the Appendix hereto. The judgment of the Superior Court of the State of Connecticut appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on August 12, 1980. A timely motion to re-argue was denied on September 18, 1980, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES,

AMENDMENT XIV:

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

CONNECTICUT GENERAL STATUTES,

SECTION 53a-54a(a):

Sec. 53a-54a. Murder defined. Affirmative defenses. Evidence of mental condition. Classification. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

SECTION 53a-55:

Sec. 53a-55. Manslaughter in the first degree: Class B felony. (a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

STATEMENT OF THE CASE

On December 10, 1975 John Keller was shot and killed by Matthew Maselli. Maselli was indicted by a grand jury for the crime of murder in violation of §53a-54a of the General Statutes of Connecticut.

At a trial to a jury, defendant Maselli, petitioner herein, admitted killing Keller, but claimed that he had fired a thirty-two caliber pistol at Keller to save his own life. Maselli, who was the only witness to the shooting, took the stand in his own behalf. Maselli testified, and evidence was introduced which corroborated his claim, that he called a cab to drive him from Stratford to Fairfield in the early morning hours of December 10; that he told the driver, Keller, who was a stranger to him, that he was a policeman in order to persuade Keller to drive on the Merritt Parkway where cabs were not permitted; that a discussion about firearms ensued; and that Keller said he carried a .44 magnum in the cab; and that Maselli told Keller that he was armed with a .32 pistol. Maselli claimed that the shooting occurred when Keller,

after saying, "I am the devil," drew what the defendant thought was a .44 Magnum pistol and pointed it at him. Maselli claimed that he responded by drawing his own gun; thought, he was about to be killed, and, so thinking, fired the entire clip at Keller within several seconds.

Despite the fact that the issues of intent and self-defense were virtually the only issues before the jury, the trial court instructed not only that "Every person is presumed to intend the natural and necessary consequences of his acts," (Appendix, D) but also instructed the jury that they were to "consider the importance to the accused of the outcome of this trial" and to include in their consideration the defendant's "obvious interest in the verdict." (Appendix, D).

The jury returned a verdict of guilty of manslaughter in the first degree and the defendant was sentenced to a term of not less than ten (10) nor more than twenty years (2) in prison (Appendix, C).

The defendant appealed his conviction to the Supreme Court of the State of Connecticut and tendered, inter alia, the issue of the constitutionality of these

portions of the charge. The defendant in his brief to the Connecticut Supreme Court argued that the portion of the charge drawing attention to the defendant's interest in the outcome of the trial impermissibly singled out the defendant as a witness and discredited his testimony, thereby denying him the protection of the presumption of innocence and due process of law. He also argued that the portion of the charge regarding the presumption of intent violated this Court's ruling in Sandstrom v. Montana, 442 U.S. 510 (1979).

The Supreme Court of Connecticut reached the questions tendered, but held that the reference in the charge to the defendant's interest in the outcome was permissible in light of a long line of state cases permitting the court to "'advise the jury that in weighing the credibility of an accused's testimony they can consider his interest in the outcome of the trial.'" (Appendix, A). Justice Bogdanski wrote a dissenting opinion in which he reasoned that this portion of the charge unconstitutionally interferes with the presumption of innocence. (Appendix, A).

The Supreme Court of Connecticut also held that the rule of Sandstrom v. Montana, was not violated by the presumption of intent section of the charge because "the elaborate instructions upon intent given by the trial court sufficiently qualified the objectionable reference to the presumption as to remove the possibility of a misunderstanding on the part of the jury." (Appendix, A).

REASONS FOR GRANTING THE WRIT

I

The Decision Below Raises a Significant and Recurring Question Regarding the Constitutionality of a Criminal Jury Instruction That Has Caused Continued Conflict Among State Courts and the United States Courts of Appeals.

Both federal and state courts have held, under a variety of rationales, that an instruction singling out the defendant's interest in the outcome of the case,

as challenged here, may be fatal to the validity of a criminal conviction.[1]

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[1] See generally cases cited at 85 A.L.R. 33 especially Dunbar v. State, 159 Miss. 603, 132 So. 748 (1934) and the following state court decisions inter alia: People v. Wilkes, 2 Cal.Rptr. 594 (1960); People v. Romo, 114 Cal.Rptr. 289 (1974); Georgia: Garvin v. State, 144 Ga. App. 396, 240 S.E.2d 925 (1977); Illinois: People v. Johnson, 333 Ill. 469, 165 N.E. 235 (1929); Indiana: Garvin v. State, 255 Ind. 215, 263 N.E.2d 371 (1970); Blackburn v. State, 390 N.E.2d 653 (1979); Iowa: State v. Bester, 167 N.W.2d 705 (1969); Minnesota: State v. Underwood, 281 N.W. 2d 337 (Minn.Sup.Ct. 1979); Mississippi: Sumrall v. Mississippi, 343 So.2d 481 (Miss. S.Ct. 1977); Missouri: State v. Finkelstein, 269 Mo. 612, 191 S.W. 1002 (1917); Nevada: Graves v. State, 413 P. 2d 503 (Nev. S.Ct. 1966); New York: People v. Bell, 38 N.Y.2d 116, 378 N.Y.S. 2d 686, 341 N.E.2d 246 (1975); Rhode Island: State v. Bruyere, 110 R.I. 426, 293 A.2d 311 (1972); Tennessee: Stewart v. State, 484 S.W.2d 77 (1972); Wisconsin: Johnson v. State, 75 Wisc.2d 344, 249 N. W.2d 593 (1977).

The Seventh[2] and Eighth Circuit[3] Courts of Appeals have disapproved the instruction for a number of years. As then Circuit Judge Blackmun observed in Taylor v. United States, 390 F.2d 278, 285 (8th Cir. 1968):

> We do not hesitate to observe, however, that the continuing and frequent attack on an instruction of this kind indicates that its use leaves defense counsel with a troubled mind. We suspect that this discomfort would be alleviated

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[2] United States v. Saletko, 452 F.2d 193 (7th Cir. 1971), cert. denied 405 U.S. 1040 (1972), which incorporates views of the Eighth Circuit but does not reverse conviction.

[3] Taylor v. United States, 390 F.2d 278 (8th Cir. 1968), cert. denied 393 U.S. 869 (1968); United States v. Bear Killer, 534 F.2d 1253 (8th Cir. 1976), cert. denied 429 U.S. 846 (1976); United States v. Standing Soldier, 538 F.2d 196 (8th Cir. 1976), cert. denied 429 U.S. 846 (1976); United States v. Brown, 453 F.2d 101 (8th Cir. 1971), cert. denied 405 U.S. 978 (1972). Generally, these cases disapprove the instruction but find no prejudice significant enough to warrant reversal. But see State v. Underwood, n. 1, infra, which cites these cases as controlling and reverses conviction based on the crucial issue of credibility of the defendant's testimony to claim of self-defense, as in the case at bar.

> if the defendant were included by reference in the court's general instructions as to all witnesses. We would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference, such as "including the defendant", should suffice.

Similarly, the standard reference work for federal jury instructions, E. Devitt and C. Blackman, Federal Jury Practice and Instructions (3d ed. 1977) §17.12 disapprove the instruction:

> [We] do not recommend that the court point to the defendant's special interest. The instruction does not tell the jurors anything they do not already know, and seems to tell them to be careful about believing the defendant.

Rather, they recommend the neutral instruction:

> "A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness."

Despite these views and the disapproval of the instruction in at least

thirteen states,[4] many states and a majority of the federal appellate courts[5] continue to adhere to an anachronistic

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[4] See generally annotation 85 A.L.R. 33 and 1976 and 1980 updates of annotation for state court decisions; Arizona: State v. Richardson, 110 Ariz. 48, 514 P. 2d 1236 (1973); Colorado: People v. Reynolds, 194 Col. 543, 575 P.2d 1286 (1978); Connecticut: State v. Guthridge, 164 Conn. 145, 318 A.2d 87 (1972); Georgia: Mitchell v. State, 121 Ga.App. 382, 173 S. E.2d 709 (1970); New Jersey: State v. Sinclair, 57 N.J. 56, 269 A.2d 161 (1970); New Mexico: State v. Turner, 81 N.M. 450, 468 P.2d 421 (1970); North Carolina: State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977) requiring balancing language; Ohio: State v. Cron, 14 Ohio App. 2d 76, 236 N.E. 2d 671 (1967); Pennsylvania: Commonwealth v. Green, 251 Pa. Super. 318, 380 A.2d 798 (1977); Tennessee: Johnson v. State, 477 S.W.2d 221 (1972); Wyoming: Simms v. State, 492 P.2d 516 (1972).

[5] Second Circuit, see cases cited infra, p. 17; U.S. v. Figurski, 545 F.2d 389 (4th) Cir. 1976); U.S. v. Wiggins, 566 F.2d 944 (5th Cir. 1978); U.S. v. Palmere, 578 F.2d 105 (5th Cir. 1978), cert. denied 439 U.S. 1118 (1979); U.S. v. Eskridge, 456 F.2d 1202 (9th Cir. 1972); Rivera-Vargus v. U. S., 307 F.Supp. 1075 (D.Puerto Rico, 1969).

acceptance of this instruction citing the decision of this Court in Reagan v. United States, 157 U.S. 301 (1895)[6] as controlling.

Reagan was decided a mere seventeen years after defendants in criminal trials were first allowed to testify on their own behalf.[7] The decision in Reagan is steeped in traditional evidentiary distrust of the testimony of an accused:

> "The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility."
>
> . . . the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation;

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[6] See Hicks v. United States, 150 U.S. 442 (1893); Hickory v. United States, 160 U.S. 40 (1896).

[7] The act of March 16, 1878 (20 Stat. 30) allowed criminal defendants to, "at his own request...be a competent witness."

> and that the interest of the defendant in the result of a trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony.[8]

Reagan v. United States utterly fails to recognize the inherent paradox created by instructions which, on one hand, caution the jury to question the defendant's credibility, and instructions which, on the other hand, urge the jury to respect the presumption of innocence. Taylor v. Kentucky, 436 U.S. 478 (1978); Kentucky v. Wharton, 441 U.S. 786 (1979).

The failure of the Reagan court to appreciate this apparent conflict is understandable since Reagan predated the establishment of the presumption of innocence as the bedrock of our system of criminal law. Coffin v. United States,

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[8] It should be noted that of the seven state decisions relied on in Reagan as persuasive, five of those states, California, Iowa, Illinois, Indiana and New York, have, in recent years, disallowed the instruction.

156 U.S. 432 (1895); In re Winship, 397 U.S. 358, 361 (1970).

Since Coffin, and more dramatically in recent years, this Court has promulgated an entire body of constitutional criminal law firmly grounded on the foundation of the presumption of innocence. As Chief Justice Burger wrote in Estelle v. Williams, 425 U.S. 501 (1976):

> The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice....To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt [cite omitted].
>
> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience. (Emphasis added)

And as Justice Powell wrote in Taylor v. Kentucky, supra, at 47:

> This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

The presumption of innocence must mean that an accused is entitled to have his guilt or innocence determined without jury consideration of extrinsic circumstances, namely, his interest in the outcome of the trial.

This Court has not ruled on the constitutionality of this instruction in over eighty years. As a result, the propriety of this instruction is continually in question; the constitutionality of the instruction is in doubt; and, generally, both state and federal courts are in disagreement and in need of guidance and direction from this Court.

The struggle of the judges of the Second Circuit Court of Appeals to deal with this instruction is illustrative of the profound confusion this eighty year

hiatus has produced. The Second Circuit seems to have developed a wholly unworkable, time-consuming "balancing" test[9] which requires case-by-case review of the language of the entire charge in each instance where the instruction is challenged. U.S. v. Stirling, 571 F.2d 708 (2d Cir. 1978) cert. denied 439 U.S. 824 (1978); U.S. v. Martin, 525 F.2d 703 (2d Cir. 1975) cert. denied 423 U.S. 1035 (1975); United States v. Floyd, 555 F.2d 45 (2d Cir. 1977) cert. denied 434 U.S. 851 (1977); United States v. Rucker, 586 F.2d 899 (2d Cir. 1978); U.S. v. Vega, 589 F.2d 1147 (2d Cir. 1978); U.S. v. Hernandez, 588 F.2d 346 (2d Cir. 1978); U.S. v. Schlesinger, 598 F.2d 722 (2d Cir. 1979) cert. denied 444 U.S. 880 (1979). The cases challenging this instruction have produced a body of law, riddled with obfuscation and conflicting rationales; the number of cases generated by this confusion underscores the need for definitive action from this Court.

Obviously, the balancing approach of

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[9] Devitt and Blackman, supra, p. 240.

the Second Circuit is not consistent with the decisions of the Supreme Court of Connecticut which baldly allow the instruction and require no balancing language. State v. Guthridge, n.4, infra.

Unlike many of the cases cited herein where certiorari has been denied, the case at bar is uniquely suited for determination of this issue. This case turns entirely on whether or not the jury believed that Maselli killed Keller in self-defense. Since Maselli was the only witness to the shooting and since his justification was self-defense, the trial court should have taken every precaution to insure that his testimony was not undermined. See Dunbar v. State, supra; State v. Underwood, supra; Estelle v. Williams, supra.

The actual conflict among the federal appellate courts and state courts regarding this instruction clearly justifies the grant of certiorari to review the judgment below. Moreover, the need to grant certiorari is enhanced by the obvious conflict between Reagan v. United States, supra, and the most recent decisions of this Court devoted to the edification of the presumption of innocence.

II

The Decision of the Supreme Court of Connecticut is in Direct Conflict With the Decision of This Court in Sandstrom v. Montana.

In Sandstrom v. Montana, 442 U.S. 510 (1979), this Court held that the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts" unconstitutionally shifted the burden of proof of an essential element of the crime of murder, namely intent, from the State to the defendant, thereby depriving the defendant of the protections of the presumption of innocence and due process of law.

The factual similarities between Sandstrom and Maselli are compelling; both suffer the same constitutional infirmity, and, therefore, Maselli's conviction should be set aside.

In Sandstrom and Maselli, each defendant admitted shooting the victim: Sandstrom claimed that chronic alcoholism prevented him from forming the requisite intent to "purposefully or knowingly" kill Annie Jessen, 442 U.S. 512; similarly

Maselli claims that the killing of John Keller was done in self-defense, and that he intended to save his own life by shooting Keller. (Appendix, p. 3a infra) Clearly, in both cases, intent was the sole element of the crime of murder which was in issue before the jury.

However, in both cases the trial court relieved the State of its burden of proving the element of intent by improperly charging the jury that they were free to presume the essential element of intent from other facts that had been proved. In Sandstrom the trial court unconstitutionally shifted the burden of proof by allowing the jury to presume that Sandstrom intended "the ordinary consequences of his voluntary acts"; in Maselli, the jury was told, in language virtually identical to the instruction disapproved in United States v. United States Gypsum Co., 438 U.S. 422 (1978) that "[e]very person is presumed to intend the natural and necessary consequences of his acts." (Appendix, pp. 5e, 5d infra)

Neither the Sandstrom instruction nor the Maselli instruction pass constitutional muster. These instructions allow

the jury to presume intent from proven facts; they allow the actus rea to prove the mens rea. The notion that an essential element of a crime can be presumed merely by the proof of other facts or elements was condemned more than twenty-five years ago by this Court in Morissette v. United States, 342 U.S. 246 (1952). That doctrine was given new vitality last year in United States v. United States Gypsum Co., supra. Furthermore, this Court found in Gypsum that such an instruction invaded the fact-finding function of the jury, thereby, relieving the State of its constitutional obligation to prove each and every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970).

And, lastly, such instructions impermissibly shift the burden of proof of an essential element of a crime from the State to the defendant in violation of the doctrines of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977).

The rationales of these cases converge in Sandstrom v. Montana, supra, to support an explicit holding that this

species of instruction -- an instruction where the jury is asked to presume intent -- is unconstitutional under the due process clause of the Fourteenth Amendment.

The petitioner tendered to the Connecticut Supreme Court the very constitutional issues decided in Sandstrom and accepted by the Supreme Court of Connecticut in State v. Harrison, Conn. (40 Conn.L.J., No. 9)(1979) and State v. Moye, Conn. (40 Conn.L.J. No. 46)(1979). The Supreme Court of Connecticut reached the question but decided that the charge in this case was permissible.

The Supreme Court of Connecticut based its decision on the fact that Maselli was convicted of manslaughter in the first degree, rather than murder, and that the trial court's instructions were "adequately qualified to avoid the possible misinterpretations found objectionable in Sandstrom." (Appendix, p. 14a infra)

The Supreme Court of Connecticut has quite simply misinterpreted the decision of this Court in Sandstrom. First of all, Connecticut has fashioned a test for Sandstrom-type problems which is totally out

of keeping with both the letter and spirit of that decision. In State v. Arroyo, Conn. (41 Conn.L.J., No. 39)(1980) the Connecticut court decided that if the court's instructions "could have been interpreted by the reasonable juror as either a conclusive or burden shifting presumption thereby undermining the jury's responsibility as factfinder",[1] then the instructions on intent would deprive the defendant of due process of law. "If on the other hand, the instructions made it clear that the jurors were permitted but not required to infer criminal intent from the defendant's conduct, then the instructions do not violate the defendant's fourteenth amendment guarantees."[2] (41 Conn. L.J., No. 39, p. 7).

This argument was made and roundly rejected in Sandstrom. 442 U.S. 514. This test is obviously at odds with Justice Brennan's crystal clear language to the contrary: "However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot dis-

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1, 2 Cites omitted.

count the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid." 442 U.S. 519 (emphasis added).

There is no language in the Maselli charge which instructs the jury on whether or not the presumption is permissive or requisite.[3] Nor is there any qualifying language in the charge relating to presumptions. Thus, the charge clearly runs afoul of this Court's decision in Sandstrom.

Furthermore, the Connecticut Supreme Court decided that because the jury had found Maselli guilty of the lesser included offense of manslaughter in the first

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[3] The Connecticut Supreme Court seems to place great emphasis on the placement of the presumption of intent language. (See State v. Arroyo, infra; but see Appendix, pp. 16a-18a.) The petitioner contends that placement is irrelevant to the unconstitutionality of the charge in the instant case.

degree, the jury obviously had considered the question of intent and had not merely presumed intent. (Appendix, p. 18a) This conclusion is logically and constitutionally erroneous. The jury's finding of guilty on the lesser included offense means only that the jury chose one form of specific intent over another form of specific intent;[4] it does not mean that they did not presume intent from proven facts. From the language of this charge, a reasonable juror could well have concluded that he was to presume either that the defendant intended to kill the victim or to presume that the defendant intended to cause serious physical injury to the victim.[5] In short, the Connecticut Supreme

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[4] An essential element of C.G.S. §53a-54a (a) is intent to cause the death of another person, while an essential element of C.G.S. §53a-55 is intent to cause serious physical injury. (Infra, pp. 3-4)

[5] Since the jury verdict was a general verdict, not specifying whether the jury relied on subsection (1) or (3) of C.G.S. §53a-55, and since the Connecticut Supreme Court decided that the jury might have relied properly upon either subsection, the question of intent remains crucial. 442 U. S. 526. (Appendix, p. 11a, infra and cases cited therein).

Court has condoned the use of an instruction that has been disapproved by this court in both United States v. United States Gypsum Co. and Sandstrom v. Montana. It is the mandate of this Court to eliminate such conflicts in our constitutional law and in our criminal courts.

The conflict between the State of Connecticut's highest court and this court justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,

SUE L. WISE
265 Church Street
New Haven, Ct. 06510
(203) 562-9931

JOHN R. WILLIAMS
265 Church Street
New Haven, Ct. 06510
(203) 562-9931

DATED: November 14, 1980

APPENDIX A

S U P R E M E C O U R T

May Term, 1980

STATE OF CONNECTICUT v. MATTHEW MASELLI

COTTER, C.J., BOGDANSKI, PETERS, PARSKEY and D. SHEA, Js.

Argued May 13-decision released August 12, 1980

Indictment charging the defendant with the crimes of murder and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where, on motion by the state, the trials were severed and the charge of murder was tried to the jury before Grillo, J.; verdict and judgment of guilty of manslaughter in the first degree and appeal by the defendant. No error.

Joette K. Rubin, assistant public defender, with whom were John R. Williams and, on the brief, Jerrold H. Barnett, public defender, for the appellant (defendant).

Linda K. Lager, assistant state's

attorney, with whom, on the brief, were Arnold Markle, state's attorney, and John J. Kelly, assistant state's attorney, for the appellee (state).

DAVID M. SHEA, J. After a jury trial the defendant was found guilty of manslaughter in the first degree in violation of General Statutes §53a-55 as a lesser offense included in the charge of murder in violation of General Statutes §53a-54a (a). In this appeal the defendant claims error upon three grounds: (1) that the two kinds of manslaughter in the first degree submitted to the jury are not properly included in the charge of intentional murder set forth in the indictment; (2) that the charge to the jury referring to the defendant's interest in the outcome of the trial prejudiced the defendant and infringed upon his constitutional right to testify in his own behalf; and (3) that the charge upon the element of intent, which referred to the presumption that a person intends the natural consequences of his acts, violated the principles of Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979).

There is little dispute about the facts which the jury might reasonably have found, because most of the evidence concerning the bizarre circumstances of this homicide came from the testimony of the defendant.

In the early morning hours of December 10, 1975, the defendant shot and killed the driver of a taxicab which he had engaged to transport him from Stratford to visit a friend in Fairfield. The defendant was the only passenger in the cab and he fired eight bullets from a .32 caliber semiautomatic revolver at close range, six of which struck the victim in the head, face and neck. The taxicab, which had been traveling west on the Wilbur Cross Parkway in Woodbridge, hit a center guard rail and finally came to rest against a tree on the side of the highway. Except for a small cut and a minor abrasion, the defendant was not injured in the crash.

The defendant claimed that he had shot the victim in self-defense as the cab was proceeding along the highway. He testified that after an evening of discussions with several associates in his

business of promoting concerts and a quarrel with his girlfriend, he called a taxicab sometime after midnight in order to visit a friend who lived on route 59 near Fairfield. When the taxicab arrived, he sat in the front seat with the driver. Because commercial vehicles are not ordinarily permitted on the Merritt Parkway, the defendant said he was a policeman and, therefore, could use that highway.

As they proceeded east on the Merritt Parkway, the victim and the defendant engaged in a conversation. Assuming that the defendant was a policeman, the victim asked if he was armed. The defendant said he had a .32 caliber automatic. The victim said he had a .44 magnum in the cab.

After a half hour of driving easterly, the defendant noticed that they had been going in the wrong direction and had reached New Haven. The driver stopped at a phone booth and the defendant telephoned his friend and found that they should have gone westerly toward route 59 rather than easterly toward exit 59.

After the taxicab was turned around to proceed in the opposite direction the

conversation resumed. The defendant testified that the driver appeared depressed but that his own mood was optimistic. The driver said something to the effect that there was no hope for the world. The defendant remarked, "Only the devil talks like that." The driver responded, "I am the devil" and reached to his left side with his right hand to grasp what the defendant imagined was his .44 magnum. The defendant testified that when he saw the pistol in the driver's right hand pointing in his general direction, he drew his own gun, struck the driver's right hand which held the pistol and fired the entire clip of bullets in his own weapon at the victim.

An examination of the taxicab by the police at the scene disclosed a pellet air pistol capable of firing BB shot lying near the left foot of the victim. There was testimony that the victim kept such a gun in his taxicab.

I

The claim of the defendant that the court erred in charging the jury upon the lesser included offense of manslaughter in the second degree was not the subject of

any exception taken at the trial, as required by Practice Book, 1978, §315. We must, nevertheless, consider the matter because the grounds relied upon, that the indictment did not inform the defendant of this charge and that the evidence was insufficient to warrant its submission, involve a claim of deprivation of a fundamental constitutional right and a fair trial.[1] State v. Troynack, 174 Conn. 89, 98, 384 A.2d 326 (1977); State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973).

We have recently held that by virtue of General Statutes §53a-45 (c)[2] a murder indictment is deemed to notify a defendant

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1 In the converse situation, where a defendant has failed to request an instruction upon a lesser included offense at the trial and claims error in its omission upon appeal, we have held that there is no fundamental constitutional right to a jury instruction on a lesser included offense. State v. Whistnant, Conn. (41 Conn. L.J., No. 33, p. 5) (1980).

2 General Statutes §53a-45 (c) provides as follows: "The court or jury before which any person indicted for murder is tried may find him guilty of homicide in a lesser degree than that charged."

that upon the trial he may be found guilty of homicide in any lesser degree than that charged. State v. Rodriguez, Conn. (41 Conn. L.J., No. 44, p. 12)(1980). It is well established that the statement of the principal charge in the indictment or information constitutes notice of any lesser included offense. Id., 19; see Paterno v. Lyons, 334 U.S. 314, 320-21, 68 S.Ct. 1044, 92 L.Ed. 1409 (1948).

In charging upon manslaughter in the first degree as a lesser offense included in the murder indictment, the trial court instructed the jury that the defendant would be guilty of that crime (1) if with intent to cause serious physical injury to the victim he caused his death, as provided in subsection (1) of General Statutes §53a-55, or (2) if under circumstances evincing an extreme indifference to human life, he recklessly engaged in conduct which created a grave risk of death to the victim and thereby caused his death, as provided in subsection (3).[3]

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3 The trial court did not instruct upon manslaughter in the first degree as delineated in subsection (2) of General Statutes §53a-55, i.e., "with intent to cause

Despite the defendant's complex argument to the contrary, we conclude that an intention to cause "serious physical injury" would encompass the more culpable mental state of intending to inflict the ultimate damage of death upon a person. See General Statutes §53a-3 (4); Webster, Third New International Dictionary. Furthermore, we have declared in the context of homicide "that an offense that would be a lesser included offense but for its requirement of a less culpable state of mind than that required for the greater, will be deemed a lesser included offense." State v. Rodriguez, supra, 20. Manslaughter in the first degree as defined

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the death of another person, he causes the death of such person or a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection." It is not claimed that such an instruction would have been appropriate in this case.

in subsection (1) of §53a-55 is a lesser included offense in a murder indictment.

The defendant's contention that manslaughter in the first degree based upon "reckless" conduct as set forth in subsection (3) of §53a-55 is not included in a charge of murder was explicitly rejected in State v. Rodriguez, supra, 20, where we overruled State v. Troynack, supra, and distinguished State v. Ruiz, 171 Conn. 264, 269-72, 368 A.2d 222 (1976), upon which the defendant has relied. In view of General Statutes §53a-45 (c), which allows a defendant indicted for murder to be found guilty of homicide in a lesser degree than that charged, it is clear that any lesser degree of homicide may be considered by the trier, subject to the requirements of State v. Whistnant, Conn. (41 Conn. L.J., No. 33, p. 5, 8) (1980), that the evidence does support a conviction of the lesser included offense and that the elements differentiating the lesser offense are sufficiently in dispute to justify finding the defendant innocent of the greater offense but guilty of the lesser. State v. Rodriguez, supra.

The defendant has made no claim in his brief that the evidence would not support a conviction of manslaughter in the first degree under both subsection (1) and subsection (3) of §53a-55. During argument, however, the question did arise of the sufficiency of the evidence to support a finding that the defendant's avowedly intentional shooting of the victim constituted "reckless" conduct creating a grave risk of death to the victim under circumstances evincing an extreme indifference to human life, as proscribed by subsection (3).

It appears that the defendant claimed neither insanity nor extreme emotional disturbance at the trial, but sought acquittal solely upon the ground of self-defense. The trial court instructed the jury upon the use of deadly physical force in defense of the person in accordance with General Statutes §53a-19, charging that "]i]t is the facts as they reasonably appear to the defendant at the time he acted which measure the existence of the right of self-defense." The jury might well have concluded that for the defendant to have believed under the circumstances

revealed by the evidence that the victim was about to use deadly force upon him so that it was necessary to fire eight shots at point blank range was such a gross deviation from the standard of conduct that a reasonable person would observe in the situation as to constitute recklessness. General Statutes §53a-3 (13).

Since we have concluded that the court properly submitted to the jury manslaughter in the first degree in violation of both subsections (1) and (3) of §53a-55, we are not concerned with the further question which the defendant raises of the failure of the verdict to specify which of these subsections the jury relied upon. See Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957); Leary v. United States, 395 U.S. 6, 31-32, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); Sandstrom v. Montana, supra, 526. The jury might properly have relied upon either subsection in this case.

II

The defendant also neglected to assert in the trial court his claim that the reference in the charge to his inter-

est in the outcome of the trial denigrated his testimony and depreciated his constitutional right to testify. Practice Book, 1978, §315. Despite the absence of the prescribed exception, the same issue has previously been regarded as falling within the principle of State v. Evans, supra, allowing review of newly raised claims of constitutional error. State v. Mastropetre, 175 Conn. 512, 525, 400 A.2d 276 (1978).

"The rule is well settled in this state that the court may advise the jury that in weighing the credibility of an accused's testimony they can consider his interest in the outcome of the trial." State v. Guthridge, 164 Conn. 145, 151, 318 A.2d 87 (1972), cert. denied, 410 U.S. 988, 93 S.Ct. 1519, 36 L.Ed.2d 186 (1973). The charge in this case was substantially identical to that given in State v. Guthridge, supra, 151n. A majority of this court has continued to adhere to the rule. State v. Mastropetre, supra, 525; State v. Bennett, 172 Conn. 324, 335-37, 347 A.2d 247 (1977); State v. Jonas, 169 Conn. 566, 577, 363 A.2d 1378 (1975); State v.

Blyden, 165 Conn. 522, 528, 338 A.2d 484 (1973); State v. Moynahan, 164 Conn. 560, 575, 325 A.2d 199 (1973). Nothing in the defendant's presentation has persuaded us to change our view.

III

Once again we are obliged to consider a claim of error in the charge not brought to the attention of the trial court in accordance with Practice Book, 1978, §315, upon the ground that a fundamental constitutional right of the defendant was violated by the instruction upon the element of intent. State v. Arroyo, Conn. (41 Conn. L.J., No. 39, p. 6) (1980).

The trial court did include amidst several paragraphs of instructions upon intent the sentence: "Every person is presumed to intend the natural and necessary consequences of his acts." In Sandstrom v. Montana, 442 U.S. 510, 525, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979), a similar instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts," was held to be impermissible without adequate qualifying instructions to remove the possibility that a jury might interpret it as either

(1) establishing a conclusive presumption that a person intends the results of his actions, or (2) as shifting the burden of proving that element of the crime from the state to the defendant.

We have reviewed the instructions[4] upon intent given in this case and find that they were adequately qualified to avoid the possible misinterpretations found objectionable in Sandstrom. The sentence relating to the "presumption" was followed by a detailed exposition about inferring intent from circumstantial evidence. The charge upon this element of the crime was substantially similar to the charge upon that subject which was found to meet the requirements of Sandstrom in

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4 The pertinent portion of the charge upon intent was as follows:

"The third element which must be proved is that the person causing the death of the person must have done so with intent to cause the death; in other words, the state must prove beyond a reasonable doubt that the accused shot Keller with intent to cause his death.

"Now, 'intent' is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences of his acts.

State v. Arroyo, Conn. (41 Conn. L.J., No. 39, pp. 6, 8)(1980). The discussion of intent was related to the principal

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"It is often impossible, and never necessary to prove criminal intent by direct evidence. Ordinarily intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference.

"A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you can believe or not according to whether or not it warrants belief. But no witness can be expected to come here and testify that he looked into another person's mind and therein saw a certain purpose or intention.

"The only way which a jury can determine what a person's purpose or intention was at any given time, aside from that person's own testimony, is by determining what the person's conduct was, and what the circumstances were surrounding that conduct; and from those infer what his purpose or intention was.

"A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. To draw such an inference, which was mentioned heretofore in my charge, is not only the privilege but it is also the duty of the jury; provided of course the inference drawn is a reasonable one.

"In this case, therefore, it will be a part of your duty to draw all reasonable

offense of murder, the court concluding: "In this case, therefore, it will be a part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times. In order for the accused to be found guilty of the charge of murder you must find beyond a reasonable doubt that he had an intent to cause the death of John Keller. If you do not find beyond a reasonable doubt that the accused had that intent then he is not guilty of murder."

In explaining the requirement of an intention to cause serious physical injury as an element of manslaughter in the first

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inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times. In order for the accused to be found guilty of the charge of murder you must find beyond a reasonable doubt that he had an intent to cause the death of John Keller.

"If you do not find beyond a reasonable doubt that the accused had that intent then he is not guilty of murder."

degree in violation of subsection (1) of §53a-55,[5] the court did not repeat its statement of the presumption condemned by Sandstrom, a circumstance found to flaw

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5 This portion of the charge was as follows:

"And so far as this case is concerned a person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury to another person he causes the death of the person . . . .

"'Serious physical injury' means physical injury which creates a substantial risk of death.

"The court has already instructed you with reference to intent. That is an element involved in the first section of the statute relating to manslaughter in the first degree which states, 'A person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury'-and I have explained 'serious physical injury' to you-'to another person, he causes the death of such person.'

"Now, in order for the accused to be found guilty of this charge, manslaughter in the first degree, the state must prove beyond a reasonable doubt, first, that the person intended to cause serious physical injury to another person and that he caused the death of such person. That relates to the first part of the statute that I referred to which involves 'intent.'"

the manslaughter verdict in State v. Arroyo, supra, 6. The previous instructions upon intent were referred to generally, but the court did say expressly that the state must have proved beyond a reasonable doubt that the defendant intended to cause serious physical injury to another person in order to obtain a conviction of that lesser included offense. We have no doubt but that the elaborate instructions upon intent given by the trial court sufficiently qualified the objectionable reference to the presumption as to remove the possibility of a misunderstanding on the part of the jury. We are reinforced in this conclusion by the fact that in this case where the defendant admitted that he intentionally fired eight bullets at the victim, causing his death, the verdict of the jury was for a conviction of the lesser offense of manslaughter in the first degree rather than murder, the sole differentiating element between the two crimes being the requisite mental state.

There is no error.

In this opinion Cotter, C.J., Peters and Parskey, Js., concurred.

BOGDANSKI, J. (dissenting). I would find error in the trial court's charge concerning the defendant's testimony and credibility.

The defendant in this case testified on his own behalf. Thereafter the court charged the jury as follows: "You consider, as you will of any other witness the interest of the accused in the case, as you would consider that of any other person who has testified. In that connection you'll consider the importance to the accused of the outcome of this trial. In other words, what I'm trying to say is that an accused person, having taken the witness stand stands before you just like any other witness and is entitled to the same considerations and must have his testimony measured in the same way as that of any other witness, which would include your consideration of his obvious interest in the verdict." (Emphasis added.)

A defendant is presumed innocent until proven guilty; Deutch v. United States, 367 U.S. 456, 471, 81 S.Ct. 1587, 6 L.Ed. 2d 963 (1961); Coffin v. United States, 156 U.S. 481, 491, 15 S.Ct. 394, 39 L.Ed. 432 (1895); and if he does not testify, no

comment can be made upon his failure to do so. Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The charge in this case placed a penalty on the defendant's decision to testify by relegating his assertion of innocence to a less credible category of testimony than that of the state's witnesses. By creating such a circumstance, the charge under consideration substantially undermines the presumption that the accused is innocent by permitting the jury to attribute a motive to the defendant that can only attach if he is indeed guilty as charged.

"[T]he accused's right to a fair trial in a fair tribunal is the very foundation of due process. . . .'Every procedure which would offer a possible temptation to the average man. . .to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 [1927]; Estes v. Texas, 381 U.S. 532, 543, 85 S.Ct. 1628, 14 L.Ed.2d 543 [1965]." Aillon v. State, 168 Conn. 541, 546-47,

363 A.2d 49 (1975). To single out the defendant for exercising his right to testify is equally as repugnant as commenting on the exercise of his right to remain silent.

The better rule is to limit the charge to a general statement of the elements by which all witnesses' testimony should be weighed and not to single out the defendant's testimony as worth less than that of any other witness. See State v. Bennett, 172 Conn. 324, 338-40, 374 A.2d 247 (1977) (Bogdanski, J., dissenting); State v. Jonas, 169 Conn. 566, 578-80, 363 A.2d 1378 (1975)(Bogdanski, J., concurring and dissenting). See, e.g., United States v. Brown, 453 F.2d 101, 107 (8th Cir. 1971), cert. denied, 405 U.S. 978, 92 S.Ct. 1205, 31 L.Ed.2d 253 (1972); Garvin v. State, 255 Ind. 215, 217-22, 263 N.E.2d 371 (1970); State v. Bester, 167 N.W.2d 705, 706-10 (Iowa 1969); Hall v. State, 250 Miss. 253, 265-67, 165 So.2d 345 (1964); State v. Finkelstein, 269 Mo. 612, 618-22, 191 S.W. 1002 (1917); Graves v. State, 82 Nev. 137, 138-42, 413 P.2d 503 (1966); Stewart v. State, 484 S.W.2d 77, 79 (Tenn. Crim. App. 1972); and cases cited at 85

A.L.R. 577; see also Bryson v. State, 291 So. 2d 693 (Miss. 1974); State v. Bruyere, 110 R.I. 426, 293 A.2d 311 (1972).

I would therefore find error, set aside the judgment and order a new trial.

APPENDIX B

NO. 8674

State of Connecticut — SUPREME COURT

vs. — STATE OF CONN.

Matthew Maselli — Sept. 18, 1980

O R D E R

The Defendant's Motion to Reargue having been presented to the Court it is hereby

ORDERED Denied.

By the Court,

Donald H. Dowling
CHIEF CLERK OF
SUPREME COURT

APPENDIX C

STATE OF CONNECTICUT

No. 20838

STATE OF CONNECTICUT SUPERIOR COURT

vs. NEW HAVEN COUNTY

MATTHEW MASELLI MAY 23, 1977

PRESENT, Hon. Anthony E. Grillo, Judge.

JUDGMENT

Upon an indictment laid before the Grand Jurors of New Haven, duly impanelled and sworn by Arnold Markle, Esquire, Attorney for the State, within and for said County on December 24, 1975 charging Matthew Maselli with the crimes of Murder and Carrying pistol without permit, and thence to January 7, 1976 when the Court (Mulvey, J.) granted the Motion of the defendant filed January 2, 1976 to reduce bond, and reduced the bond to $75,000., and thence to January 23, 1976 when the defendant filed a Motion to have counsel present at Grand Jury Hearing, Motion to have minutes of Grand Jury hearing transcribed, Motion to suppress statement of defendant, Matthew Maselli, and thence to January 26, 1976 when the Court (O'Brien, J.) denied said Motions, and when the

Court (O'Brien, J.) granted the Motion of the defendant filed January 23, 1976 to exclude defendant from Grand Jury room during taking of evidence, and when said Grand Jurors on January 26, 1976 endorsed a true bill as to the crime of Murder, as more fully appears by said Bill of Indictment, as on file, and thence to February 10, 1976 when the defendant appeared before this Court and for plea said Not Guilty to both counts of said indictment, and elected to be tried by a Jury of 12 on the first count, and to be tried by a Jury of 6 on the second count, and thence to March 16, 1976 when the Court (Mulvey, J.) denied the Motion of the defendant filed February 9, 1976 to reduce bond, and thence to March 30, 1976 when the Court (Mulvey, J.) granted in part the Motion of the defendant filed March 22, 1976 for disclosure, production, inspection and examination, and thence to April 2, 1976 when a Discovery was filed as ordered by the Court, and thence to April 27, 1976 when the Court (Santaniello, J.) granted the Motion of the defendant filed April 21, 1976 to reduce bond, and reduced the

bond to $50,000., and thence to December 23, 1976 when the Court (O'Brien, J.) granted the Motion of the defendant filed December 23, 1976 to direct Clerk to subpoena military and medical records, and thence to January 20, 1977 when the Court (Grillo, J.) granted the oral Motion of the State to sever counts for trial, and denied the oral Motion of the defendant for mistrial, and thence to February 1, 1977 when the defendant filed a Motion for a directed verdict, which Motion the Court (Grillo, J.) denied, and thence to February 4, 1977 when all the evidence having been submitted, said first count of said information was committed to the Jury who returned a verdict of Guilty to lesser included offense of Manslaughter in the 1st Degree at 4:10 p.m., which verdict was accepted and ordered recorded by the Court, and when the Court (Grillo, J.) granted the oral Motion of the State to increase the bond and increased bond to $100,000., and thence to February 7, 1977 when the defendant filed a Motion to set aside said verdict, and thence to February 22, 1977 when the Court (O'Brien, J.)

granted the Motion of the defendant for commitment under Sec. 17-244, and when said defendant was committed to the diagnostic Unit of Connecticut Valley Hospital not to exceed 60 days, and thence to March 31, 1977 when the Court (Grillo, J.) granted the Motion of the State for return of victim's property, and thence to April 25, 1977 when a report from Dr. Francisco Quintana, psychiatrist, was filed, and when the prisoner appeared before this Court for sentence, and when the Court imposed the following sentence:

> Not less than ten, nor more than twenty years in the Correctional Institution, Somers, on condition that he be evaluated for psychiatric treatment,

and thence to May 11, 1977 when the defendant filed a Motion to vacate said judgment, and thence to the present time when the parties appeared and were heard by the Court, and when the Court denied the Motion filed February 7, 1977 to set aside said verdict and granted the Motion to vacate the judgment and vacated the judgment entered April 25, 1977 and entered a new judgment.

Whereupon it is adjudged that said prsioner suffer imprisonment in the Correctional Institution, Somers, for a term of not less than ten, nor more then twenty years, on condition that he be evaluated for psychiatric treatment.

BY THE COURT,
Leonard J. Gilhuly
Assistant Clerk

APPENDIX D

FEBRUARY 2, 1977

RELEVANT PORTIONS OF CHARGE TO JURY

Defendant's Interest in Outcome

"Now, in that regard an accused person is not obligated to take the witness stand in his own behalf unless he wishes to; on the other hand he has a perfect right to take the witness stand in his own behalf -- as this accused has seen fit to do. Whereas, as here, an accused person does take the witness stand to testify in his own behalf you apply to his testimony the same standards by which you determine the testimony of any other witness.

You consider, as you will of any other witness the interest of the accused in the case, as you would consider that of any other person who has testified. In that connnection you'll consider the importance to the accused of the outcome of this trial.

In other words, what I'm trying to say is that an accused person, having taken the witness stand stands before you just like any other witness and is entitled to the same considerations and must

have his testimony measured in the same way as that of any other witness, which would include your consideration of his obvious interest in the verdict."
Tr. pp. 709-710.

Essential Elements of Crimes Charged

"Because of that rule I must explain to you the law and the elements of each type, of each of the types of homicide forbidden by our Statutes. Our Statute concerning murder, insofar as pertinent to this case reads in part as follows: "A person is guilty of murder when, with intent to cause the death of another person he causes the death of such person." There are three essential elements in the crime of murder; first, the death of one person must be caused by another person; secondly, the person causing the death must be of sound mind, that is, legally sane; and third, the person causing the death of the person must have done so with intent to cause the death.

The first element, namely the death of one person must be caused by another person lies at the basis of the crime of murder. You must find that to have occur-

red as a fact. In order to convict this accused of a crime of murder you must find, first of all, that the accused caused the death of John Keller, the person named in the indictment. You must find proven beyond a reasonable doubt that John Keller died as a result of the shooting by him by the accused, if you find that the accused did shoot him.

If you find that John Keller so died then you will have found that the accused caused his death. This is the first thing that must be considered by you.

The second element which the State must prove is that at the time of the death of John Keller the accused, the person causing his death was of sound mind, that is, legally sane; that is, a person is of sound mind, legally sane and responsible for his criminal or unlawful conduct if, at the time of such conduct he does not, as a result of mental disease or defect lack substantial capacity either to appreciate the wrongfulness of his conduct, or conform his conduct to the requirements of the law.

Now, as far as that's concerned keep

this in mind: There's no claim here by the defendant that he was insame or mentally ill. Keep in mind also that it is true that the burden of proving an accused is of sound mind is upon the State; it is also true that because most men are of sound mind the law presumes that an accused was of sound mind at the time of the incident in which the charge is based, unless there is some credible evidence tending to prove the contrary, which has been introduced.

In this case, as I recall the evidence no such evidence was introduced. But as I said earlier your recollection of the evidence controls.

The third element which must be proved is that the person causing the death of the person must have done so with intent to cause the death; in other words, the State must prove beyond a reasonable doubt that the accused shot Keller with intent to cause his death.

Now, "intent" is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary conse-

quences of his acts.

It is often impossible, and never necessary to prove criminal intent by direct evidence. Ordinarily intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference.

A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you can believe or not according to whether or not it warrants belief. But no witness can be expected to come here and testify that he looked into another person's mind and therein saw a certain purpose or intention.

The only way which a jury can determine what a person's purpose or intention was at any given time, aside from that person's own testimony, is by determining what the person's conduct was, and what the circumstances were surrounding that conduct; and from those infer what his purpose or intention was.

A person acts intentionally with

respect to a result or to conduct described by a Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. To draw such an inference, which was mentioned heretofore in my charge, is not only the privilege but it is also the duty of the jury; provided of course the inference drawn is a reasonable one.

In this case therefore, it will be a part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times. In order for the accused to be found guilty of the charge of murder you must find beyond a reasonable doubt that he had an intent to cause the death of John Keller.

If you do not find beyond a reasonable doubt that the accused had that intent then he is not guilty of murder.

As I explained to you previously, any person indicted for murder may be found guilty of homicide in a lesser degree than that charged. So that brings us to a consideration of the elements involved

in manslaughter in the first degree. And so far as this case is concerned a person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury to another person he causes the death of that person; or when he, under circumstances evincing an extreme indifference to human life recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

"Serious physical injury" means physical injury which creates a substantial risk of death.

The Court has already instructed you with reference to intent. That is an element involved in the first section of the Statute relating to manslaughter in the first degree which states, "A person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury" -- and I have explained "serious physical injury" to you -- "to another person, he causes the death of such person".

Now, the other part of the Statute reads, "Or when he, under circumstances

evincing an extreme indifference to human life recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person".

Now, in order for the accused to be found guilty of this charge, manslaughter in the first degree, the State must prove beyond a reasonable doubt, first, that the person intended to cause serious physical injury to another person and that he caused the death of such person. That relates to the first part of the Statute that I referred to which involves "intent".

Now, a person may also be guilty of manslaughter in the first degree if the State proves beyond a reasonable doubt, first, that the accused's conduct evinced an extreme indifference to human life; second, that the accused's conduct created a grave risk of death to another person; third, that the accused caused the death of John Keller; and fourth, that the death of John Keller was caused by the reckless conduct of the accused. There's no element of specific intent involved in this section of the Statute relating to man-

slaughter in the first degree. The gist of the charge is recklessness.
Tr. pp. 711-718.

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NO. 80-799

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

MATTHEW MASELLI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LINDA K. LAGER
Assistant State's Attorney
235 Church Street
New Haven, CT 06510
(203) 789-7894

Counsel for the State of Connecticut

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QUESTIONS PRESENTED

1. Is a defendant's right to a fair trial violated by instructing the jury that it may consider the defendant's interest in the outcome of the trial when assessing his credibility as a witness?

2. When viewed in the context of the entire charge which is phrased in terms of "inference," does the isolated use of the sentence "Every person is presumed to intend the natural and necessary consequences of his acts" deny the defendant due process and conflict with *Sandstrom v. Montana*, 442 U.S. 510 (1979)?

STATEMENT OF THE CASE

After a trial to a jury, Matthew Maselli, the defendant, was found guilty of manslaughter in the first degree in violation of Conn. Gen. Stat. §53a-55 (1958 Code, Rev. to 1977), a lesser included offense of the charge of murder in violation of Conn. Gen. Stat. §53a-54a(a) (1958 Code, Rev. to 1977). In the early morning hours of December 10, 1975, Maselli had fired eight bullets from a .32 caliber semiautomatic revolver at close range at the driver of a taxicab in which he was travelling. Six shots struck the driver, killing him. Maselli testified in his own behalf and claimed that he shot the victim in self-defense, while the taxicab was proceeding at high speed along the highway. He claimed that the victim had told him he carried a .44 magnum in the cab and subsequently threatened him with it. A pellet air pistol capable of firing BB shot was found in the taxicab lying near the left foot of the victim.

Two issues presented on appeal to the Connecticut Supreme Court, and now raised in this petition, concerned the trial court's instructions to the jury. No exceptions or objections were made by trial counsel to the challenged instructions, contrary to the provisions of §315 of the Connecticut Practice Book. Nonetheless, the Connecticut Supreme Court considered these issues under the principle of *State v. Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973), that allows it to consider questions not raised below where the defendant claims he was denied a fundamental constitutional right and a fair trial. The Connecticut Supreme Court rejected the defendant's challenges to the jury instructions. It declined to change the "well settled" rule in the State of Connecticut that "the court may advise the jury that in weighing the credibility of an accused's testimony they can consider his interest in the outcome of the trial." *State v. Guthridge*, 164 Conn. 145, 151 318 A.2d 87 (1972), *cert. denied*, 410 U.S. 988 (1973). Furthermore, it

reviewed the instructions upon intent in the context of the charge as a whole and found that they were sufficiently qualified to avoid possible misinterpretation by the jury as either shifting the burden to the defendant or mandating a conclusive presumption. Since the intent instructions need to be considered in the context of the entire charge, as they were by the Connecticut Supreme Court, that charge is printed in its entirety in the appendix to this brief.

REASONS FOR DENYING THE WRIT

I. THE PROPRIETY OF THE CREDIBILITY INSTRUCTION USED IN THIS CASE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

Connecticut belongs to the the majority of jurisdictions which hold that it is proper to instruct the jury to consider the defendant's interest in the outcome of the trial when weighing his credibility. Annot., 85 A.L.R. 523, 538 (1933)[1] Although some courts have condemned instructions which focused on the defendant's testimony, *see e.g., State v. McCarty,* 179 N.W.2d 548, 552 (Iowa 1970) (charge focused on defendant's testimony as it bore on the question of guilt or innocence); *Garvin v. State,* 255 Ind. 215, 263 N.E.2d 371, 372 (1970) (defendant's credibility weighed by a different and harsher rule than that applied to other witnesses); the charge used here does not single out the defendant in an inappropriate and constitutionally unfair manner. The standard Connecticut instruction, far from drawing attention to the defendant's testimony or placing him in a separate category, repeatedly cautions the jury to treat the defendant's testimony in the same fashion as

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[1] *See, e.g., United States v. Jones,* 587 F.2d 802, 806 (5th Cir. 1979); *United States v. Figurski,* 545 F.2d 389, 392 (4th Cir. 1976)0 *United States v. Tolkow,* 532 F.2d 853, 859 (2d Cir. 1976); *United States v. Ambrose,* 483 F.2d 742, 753 (6th Cir. 1973); *United States v. Malasanos,* 472 F.2d 642, 645 (7th Cir. 1973); *United States v. Jones,* 459 F.2d 1225 (D.C. Cir. 1972); *United States v. Eskridge,* 456 F.2d 1202, 1205 (9th Cir.), *cert. denied,* 409 U.S. 883 (1972); *People v. Reynolds,* 575 P.2d 1286 (Colo. 1978); *People v. Farnsley,* 53 Ill.2d 537, 293 N.E.2d 600 (1973); *People v. Thomas,* 7 Mich. App. 519, 152 N.W.2d 166 (1967); *State v. Sinclair,* 57 N.J. 56, 269 A.2d 161 (1970); *Commonwealth v. Gilbert,* 254 Pa. Super. 583, 386 A.2d 101 (1978).

it treats the testimony of any other witness when assessing credibility. Thus, the instruction comports with the philosophy expressed by this court in *Reagan v. United States*, 157 U.S. 301, 305 (1895), that once a defendant assumes the position of a witness,

> he is entitled to all its rights and protections and is subject to all its criticisms and burdens .... The jury properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence in determining how much of credence he is entitled to.

That the defendant's testimony concerned his claim of self-defense does not broaden the narrow question presented here nor endow the issue with constitutional dimensions. A defendant who asserts that he acted in self-defense is no different from one who testifies in order to deny culpability. Whether the credibility instruction denied the defendant a fair trial would still have to be evaluated in light of the totality of the circumstances including all the jury instructions and all the evidence. *See Kentucky v. Whorton*, 441 U.S. 786 (1979).

Even in jurisdictions which have expressed a preference against instructions which "single out" the defendant, the instruction is measured in the context of the entire case to determine if there was prejudicial error. *United States v. Standing Soldier*, 538 F.2d 196, 204 (8th Cir. 1976). (Instruction held not prejudicial in a case that depended on the defendant's credibility.) In the context of this case, the defendant could not show that he was prejudiced by the charge. In addition to the fact that there was substantial evidence of guilt, there was no request for a different credibility instruction and no objection to the one given, the jury was fully instructed on the presumption of innocence and the state's burden

of proof, it was cautioned to treat the defendant in the same manner as any other witness, and there were no suggestions made to the jury that the defendant should be convicted merely because he was the defendant or chose to testify. In fact, the defendant's trial counsel acknowledged that the court's charge was fair. This Court should not grant certiorari simply to review these facts and circumstances, which were already considered fully by the Connecticut Supreme Court in addressing this issue and the other questions raised on appeal before it.

II. THE CONNECTICUT SUPREME COURT'S RULING ON THE INTENT INSTRUCTIONS IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

Rather than ruling in conflict with this Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Connecticut Supreme Court followed the course suggested by that decision as well as other relevant decisions of this Court. *See, e.g., County Court of Ulster County v. Allen*, 442 U.S. 140, 157-159, n. 16 (1979); *Cupp v. Naughten*, 414 U.S. 141 (1973). *Sandstrom* requires a reviewing court to pay "careful attention to the words actually spoken to the jury...for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. at 514. Thus the isolated use of the sentence "Every person is presumed to intend the natural and necessary consequences of his act" does not establish a *per se Sandstrom* violation. As the Connecticut Supreme Court correctly recognized, the presence of "qualifying instructions as to the legal effect" of the instruction can cure the potential constitutional infirmity of the challenged language.

In examining this sentence, which was used once in the course of a detailed explanation to the jury that intent may be inferred from conduct, the question properly asked by the Connecticut Supreme Court was whether a reasonable juror could have interpreted it in an impermissible way regardless of the surrounding instructions and the charge read in its entirety. The challenged sentence appeared in the following context:

> The third element which must be proved is that the person causing the death of the person must have done so with intent to cause the death; in other words, the State must prove beyond a reasonable doubt that the accused shot Keller with intent to cause his death.

Now, 'intent' is a mental process. *A person's intention may be inferred from his conduct.* Every person is presumed to intend the natural and necessary consequences of his acts.

It is often impossible, and never necessary to prove criminal intent by direct evidence. Ordinarily intent can be proved only by circumstantial evidence, as I have explained that term to you. *What a person's purpose or intention has been is necessarily very largely a matter of inference.*

A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you can believe or not according to whether or not it warrants belief. But no witness can be expected to come here and testify that he looked into another person's mind and therein saw a certain purpose or intention.

The only way which a jury can determine what a person's purpose or intention was at any given time, aside from that person's own testimony, is by determining what the person's conduct was, and what the circumstances were surrounding that conduct; and from those infer what his purpose or intention was.

A person acts intentionally with respect to a result or to conduct described by a Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. To draw such an inference, which was mentioned heretofore in my charge, is not only the privilege but it is also the duty of the jury; provided of course the inference drawn is a reasonable one.

> In this case therefore, it will be a part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times. In order for the accused to be found guilty of the charge of murder you must find beyond a reasonable doubt that he had an intent to cause the death of John Keller.
>
> If you do not find beyond a reasonable doubt that the accused had that intent then he is not guilty of murder.

In explaining the intent requirement of manslaughter in the first degree,[2] the court specifically told the jury that "the state must prove beyond a reasonable doubt, first, that the person intended to cause serious physical injury to another person and that he caused the death of such person."

The wording and context of the instructions in their totality removed the possibility that a reasonable juror would have construed the challenged sentence as a mandatory presumption or as shifting the burden of proof to the defendant. Since the jury acquitted the defendant of murder and convicted him of the lesser offense of manslaughter, it obviously believed that the state had proved beyond a reasonable doubt that the defendant had committed the homicidal act but did not

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[2]The defendant was found guilty of manslaughter in the first degree in violation of Conn. Gen. Stat. §53a-55 (1978 Code, Rev. to 1977). Under that statute a defendant may be found guilty if (1) with intent to cause serious physical injury to the victim he caused his death or (2) under circumstances evincing an extreme indifference to human life, he recklessly engaged in conduct which created a grave risk of death to the victim and thereby caused his death. The verdict did not specify which portion of the statute the jury relied upon. However, the Connecticut Supreme Court concluded that the evidence was sufficient to support a conviction of manslaughter in the first degree under either portion.

feel constrained to presume that he intended to cause death. Thus the jury must have understood the charge as stating a permissible inference rather than a mandatory presumption. Moreover, the court repeatedly instructed the jury about the state's burden of proof, leaving no doubt that in order to return a guilty verdict the jury had to be satisfied that the state had proved each essential element of the crime and disproved the defense of self-defense beyond a reasonable doubt.

In light of the above, the Connecticut Supreme Court's rejection of the defendant's asserted constitutional claim conformed to the requirements of *Sandstrom*. The defendant has failed to demonstrate a conflict with that decision and his petition for writ of certiorari should be denied on this ground.

CONCLUSION

For the reasons set forth in this brief, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

LINDA K. LAGER
Assistant State's Attorney
Counsel for the State of
Connecticut, Respondent.

NO. 80-799

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

MATTHEW MASELLI,
Petitioner

v.

STATE OF CONNECTICUT,
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APPENDIX

APPENDIX

THE COURT: Ladies and gentlemen, of course, you know by this time that this is a case of a criminal nature, that is, one that's been brought by the Office of the State's Attorney for New Haven County as a result of the charge that was instituted in this case by the Grand Jury.

You've heard counsel for the State and counsel for the accused, representing the respective parties as they do. They have urged upon you their contentions in this case. We take no sides as far as the Court is concerned and so far as the jury is concerned. Both parties have presented their claims, the State's Attorney on behalf of the State and the accused through his attorney. Of course it is for you to decide the case now under the instructions of the Court.

I want to say this to you, too, at this time; that I'm going to read, or perhaps mention certain items that I have taken into consideration in this case in an endeavor to instruct you and explain to you what the law is in a particular case. I am here to instruct you on the law and help you to apply it to the facts in the case. You are here to decide through the law, and the evidence, whether the defendant is guilty or not guilty. You are here to decide from the evidence what happened in relation to this accused, whether he's guilty or not guilty. Your consideration need not go beyond that. The responsibility of what might happen thereafter rests with the Court.

Can everybody hear me there?

As I said it is the duty of the Court to instruct you as to the law and its application to the facts. It's your duty to determine the facts, apply the law given to you by the Court, and so arrive at a legal verdict. It is as much your duty to accept the instructions I give you as

to the law and its application as it is mine to give it to you.

On the other hand I must leave the facts for your decision and not decide them for you.

In order to assist you in applying the law to the facts, however, I may to a certain extent comment on the evidence - although I might say that in this particular case "The waterfront has been covered" quite thoroughly, it seems to me, by counsel on both sides and I won't allude to the evidence to any great degree.

But, in any event, if I, in calling your attention to certain evidence in this case, if I inadvertently misstate it, it's your duty to make correction of any mistakes. If I refer to certain evidence in this case, you are not to understand that I mean to limit your consideration to that evidence. For my purpose will be, by the use of certain evidence, to illustrate to you the method in which you are to apply the law to all of the evidence.

Now, there are certain principles of law to be considered in the trial of every and all criminal cases. And briefly they are, that when an accused comes to trial he's presumed to be innocent of the offense of which he's charged.

The burden is upon the State to prove his guilt, and to prove his guilt the State must satisfy the jury beyond a reasonable doubt of guilt as charged. This means when the accused comes into court he is to be taken by those who try him - namely you, the jury - to be innocent. He's entitled to stand before you as though no charge had ever been made against him. The fact that the State has made a charge against him may not be taken to be an indication of his guilt of that charge.

The presumption of innocence continues until or unless the evidence satisfies the jury beyond a reasonable doubt that he is guilty of the offense or offenses

he's charged with having committed. Neither will you consider in arriving at your verdict the fact that the accused has been arrested; that plays no part in your deliberations in this case.

The accused does not have to prove that he did not commit the crime with which he's charged in this Information but the State must prove that he did commit the offense and must prove every essential element of the charge beyond a reasonable doubt.

The burden of proof that the law puts upon the State is to prove the guilt of the accused beyond a reasonable doubt. A "reasonable doubt" is an honest doubt, a real doubt, a doubt which has its basis in the evidence presented or the lack of evidence and one for which a person can assign, at least in his own mind a reason and one which he can defend in reason.

Proof beyond a reasonable doubt is such proof as precludes every reasonable hypothesis except that which it tends to support and is inconsistent with any other rational conclusion. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt you must adopt the one of innocence and unless you are convinced of guilt beyond a reasonable doubt you must find Mr. Maselli not guilty.

There must be no reasonable doubt as to the essential elements of the crime. It is not a doubt raised by one, however, who questions for the sake of raising a doubt; it is not a surmise, a guess, a conjecture or an imaginary doubt; it is not a capricious or frivolous doubt, nor a doubt raised by the ingenuity of counsel by a juror and unwarranted by the evidence; nor is it a doubt prompted by sympathy for the accused.

A reasonable doubt is a real doubt, an honest doubt, a doubt which has a foundation in the evidence offered in the case or lack of evidence.

Absolute certainty in the affairs of life is almost never attainable and the law does not require absolute certainty to authorize a conviction. What it does require is that guilt be established as charged beyond a reasonable doubt, which is one founded upon the evidence, one which you - as reasonable men and women, and proven men and women - would be willing to act upon in the more weighty and important matters relating to your own affairs.

It is proof wholly consistent with the defendant's guilt and inconsistent with any other rational conclusion.

Now, the State does not desire the conviction of innocent persons or of any persons whose guilt upon the evidence there is reasonable doubt. The State is as much concerned in having an innocent person acquitted as in having a guity person punished. But for the safety and well-being of society and the protection of life and property the State is concerned with securing the conviction of persons who have been proven by the evidence beyond a reasonable doubt to have been guilty of committing the crime charged against them.

Now, I do charge you on this principle: That is, in order to secure a conviction in a criminal case the State must not have to prove motive; that is, it is not necessary for the State to prove what reason an accused person had for committing the crime charged, what motivated him to commit it. The law recognizes the fact that crimes are generally committed from some motive. Evidence tending to show the existence of motive is admissible and often strong evidence tending to prove the guilt of an accused, if it appears he has a motive.

In the same manner in any case in which there appears to be no adequate motive on the part of the particular accused to commit the crime, that evidence tends to raise a reasonable doubt as to the guilt of that accused. Whatever motivates a man, however, rests only

in his own mind; no one else can look into his mind and see what is there. Whatever was in his mind must be inferred from his conduct in light of the surrounding circumstances. The jury is entitled, indeed it is its duty to draw such inferences from a man's conduct as are reasonable inferences. If no motive can be inferred or found that may well lead to reasonable doubt as to the guilt of the accused, or it might not raise such a doubt.

If the absence of an apparent motive does not raise a reasonable doubt that the accused is guilty, then the mere fact that the State has been unable to prove what the motive was that the accused actually had, does not prevent the jury from returning a verdict of guilty.

Now, another principle of law which I will instruct you on and discuss with you at this time is the principle of law concerning circumstantial evidence. Now, there are two kinds of evidence offered in any court of law in the trial of cases: direct testimony, which is the testimony given by a witness who says that he saw or heard, there came within the field of his own senses certain facts, that he relates to you; that is a kind of evidence we call circumstantial evidence - excuse me - direct testimony, that is the type that we call direct testimony: When a person actually saw or heard a thing, et cetera. That's direct testimony.

In other words, "I saw John Jones go down the street," or "I heard a loud noise upstairs," that's direct testimony. There is also the evidence which is made up of inference of a fact from other facts proven to you. The essential difference between them is that in the one case the witness says he saw or knew, and in another case the witness says that he saw or he knew certain facts, and then you are asked from those facts to draw the inference that certain other facts existed.

In the latter case you should first pass upon the statement of the witness as to the existence of facts which he testifies to; and then when you are satisfied of

them, that you ask yourselves, can you from the facts as proved find the further fact or facts which you are asked to infer?

In passing upon this kind of evidence, which I call "evidence of inference" it is usual to give an additional caution that facts must be proven beyond a reasonable doubt to justify a conviction; in other words, it's nothing more than an amplification of the rule because there's no essential difference in the two kinds of evidence. The question at the end always is: Has the fact been proven beyond a reasonable doubt? Do the facts and circumstances in the case, which they find to be proven - that is, you - the jury find to be proven from the testimony, point clearly and irresistibly to the fact which you, the jury, are asked to infer?

If they do not point clearly and irresistibly to the fact they are asked to infer, then the jury is not justified in finding this further fact, and if in the consideration of the circumstances there is any explanation which reasonably offers itself consonant with the innocence of the accused, then those facts and circumstances do not clearly and irresistibly point to the fact of guilt, and then he cannot be found guilty upon the basis of such inference.

I'd like to talk to you about credibility. There is another principle of law concerning which I would like to charge you at this time, and that is the principle of law dealing with credibility of witnesses. The credibility of witnesses and the weight to be given to their testimony are matters which it is peculiarly your function to determine, and for a moment, before I go on to that let me say this with regard to circumstantial evidence; you probably heard the cardinal explanation of what constitutes circumstantial evidence by the old story about a box being put in a corner with some cheese in it, and a mouse goes in there; and nobody has seen the mouse eat the cheese; but then you come back a few minutes later and the cheese is gone. Well, that's an example of what I'm trying to say.

In this particular case, for example, the State says that this man was driving at 55 - 50-55 miles an hour - it's your recollection that counts - and that the State claims that if the deceased took the gun from his left side, that is, the so-called magnum, and pulled it up; and then claims that if Mr. Maselli, the defendant, pushed the arm, the right arm of the victim, Mr. Keller, back, then that must have let the gun scramble off in some direction. It claims as a result of that situation the gun should have been some place other than in the front-left of the car, which the evidence shows the gun was after the accident.

Now, it's your recollection that counts and not mine. On the other hand then you have the State's - rather, the defendant's contention that if the shooting occurred when the car was going from, I don't know, 50, 55 miles an hour, the defendant insists that it would be foolish for a defendant to shoot a man in a car going that many miles an hour unless something untoward happened in that car; and the defendant's position is that the untoward thing that happened in that car, is that he was suddenly confronted - that is, Mr. Maselli - was suddenly confronted with a gun; and that he had to do something right away to protect himself regardless of the fact that the car is going 50 or 55 miles an hour.

So, it's for you to determine what you are to make of that situation.

The State claims that if that was the situation the car would have been, rather the gun would have been somewhere other than in the left side of the car, in the vicinity where it was found according to the evidence presented by the State. And it is for you to determine if that is or is not so. Whereas the defendant claims that going 50 or 55 miles an hour, shooting somebody means, asks you to infer from that that something untoward happened with regard to him and the driver and that it called for immediate action regardless of the speed of the car.

He claims that you can infer from that that, his defense is, i.e., this was a case where he had to do something right away: that is, defend himself.

Now, there is another principle of law governing, which I would like to charge you at this time as I said before, and that is the question of credibility. No fact of course is to be determined merely by the number of witnesses testifying for or against it. It is quality and not quantity of the testimony which controls.

In weighing the testimony of a witness you consider his appearance upon the stand, you should try to size him up, you should have in mind all those little circumstances that point to his truthfulness or untruthfulness. You should consider any possible bias or prejudice he may have, his interest or lack of interest in the case or in the outcome of the trial, his opportunity and ability to observe facts correctly and to remember and relate them truly and accurately.

You should test the evidence he or she gives by your own knowledge of human nature and of the motives which influence and control human action. If any facts are admitted or otherwise proven to you you may well bring them into relation with his testimony and see if they fit together with it.

In short you are to bring to bear upon it the same considerations and use the same sound judgment you apply to questions of truth and veracity which are daily presenting themselves for your decision and your life in the everyday affairs of life.

Now, with regard to this question of credibility let me say this: That as you have been apprised in the voir dire the fact that a man is an expert, the fact that a man is a police officer or state trooper doesn't mean that you have to accept his testimony merely because he's a police officer, merely because he's an expert, merely because he's a state trooper. You are to appraise

his evidence under the same standard and according to the same criteria that I just read to you.

Now, in that regard an accused person is not obligated to take the witness stand in his own behalf unless he wishes to; on the other hand he has a perfect right to take the witness stand in his own behalf - as this accused has seen fit to do. Whereas, as here, an accused person does take the witness stand to testify in his own behalf you apply to his testimony the same standards by which you determine the testimony of any other witness.

You consider, as you will of any other witness the interest of the accused in the case, as you would consider that of any other person who has testified. In that connection you'll consider the importance to the accused of the outcome of this trial.

In other words, what I'm trying to say is that an accused person, having taken the witness stand stands before you just like any other witness and is entitled to the same considerations and must have his testimony measured in the same way as that of any other witness, which would include your consideration of his obvious interest in the verdict.

Now, the accused stands charged with causing the death of John Keller by shooting him, and that he did shoot John Keller with the intent to cause the death of John Keller. More specifically the Grand Jury accused Matthew Maselli of the City of New Haven of the crime of murder and charged that at the Town of Woodbridge on December 10th, 1975 the said Matthew Maselli, with intent to cause the death of another person, to wit, John Keller, he did cause the death of such person on December 10th, 1975 in violation of the Statute of the State of Connecticut.

Now, before considering in detail the elements in the present case I shall call to your attention certain ele-

ments of the law dealing with homicide. Homicide means conduct which causes the death of a person. A "person" of course means a human being. Under our laws there are several types of homicides, ranging in degrees of seriousness from murder to criminal negligence homicide - criminally; better make sure that we don't throw in an adjective instead of an adverb here.

The accused in this case is, as I have pointed out, in the indictment which I have just read to you, charged with murder. However, under our law a jury, before which a person indicted for murder is tried may find him guilty of homicide in a lesser degree than that charged.

Because of that rule I must explain to you the law and the elements of each type, of each of the types of homicide forbidden by our Statutes. Our Statute concerning murder, insofar as pertinent to this case reads in part as follows: "A person is guilty of murder when, with intent to cause the death of another person he causes the death of such person." There are three essential elements in the crime of murder; first, the death of one person must be caused by another person; secondly, the person causing the death must be of sound mind, that is, legally sane; and third, the person causing the death of the person must have done so with intent to cause the death.

The first element, namely the death of one person must be caused by another person lies at the basis of the crime of murder. You must find that to have occurred as a fact. In order to convict this accused of a crime of murder you must find, first of all, that the accused caused the death of John Keller, the person named in the indictment. You must find proven beyond a reasonable doubt that John Keller died as a result of the shooting by him by the accused, if you find that the accused did shoot him.

If you find that John Keller so died then you will have found that the accused caused his death. This is the first thing that must be considered by you.

The second element which the State must prove is that at the time of the death of John Keller the accused, the person causing his death was of sound mind, that is, legally sane; that is, a person is of sound mind, legally sane and responsible for his criminal or unlawful conduct if, at the time of such conduct he does not, as a result of mental disease or defect lack substantial capacity either to appreciate the wrongfulness of his conduct, or conform his conduct to the requirements of the law.

Now, as far as that's concerned keep this in mind: There's no claim here by the defendant that he was insane or mentally ill. Keep in mind also that it is true that the burden of proving an accused is of sound mind is upon the State; it is also true that because most men are of sound mind the law presumes that an accused was of sound mind at the time of the incident in which the charge is based, unless there is some credible evidence tending to prove the contrary, which has been introduced.

In this case, as I recall the evidence no such evidence was introduced. But as I said earlier your recollection of the evidence controls.

The third element which must be proved is that the person causing the death of the person must have done so with intent to cause the death; in other words, the State must prove beyond a reasonable doubt that the accused shot Keller with intent to cause his death.

Now, "intent" is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences of his acts.

It is often impossible, and never necessary to prove criminal intent by direct evidence. Ordinarily intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference.

A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you can believe or not according to whether or not it warrants belief. But no witness can be expected to come here and testify that he looked into another person's mind and therein saw a certain purpose or intention.

The only way which a jury can determine what a person's purpose or intention was at any given time, aside from that person's own testimony, is by determining what the person's conduct was, and what the circumstances were surrounding that conduct; and from those infer what his purpose or intention was.

A person acts intentionally with respect to a result or to conduct described by a Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. To draw such an inference, which was mentioned heretofore in my charge, is not only the privilege but it is also the duty of the jury; provided of course the inference drawn is a reasonable one.

In this case therefore, it will be a part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times. In order for the accused to be found guilty of the charge of murder you must find beyond a reasonable doubt that he had an intent to cause the death of John Keller.

If you do not find beyond a reasonable doubt that the accused had that intent then he is not guilty of murder.

As I explained to you previously, any person indicted for murder may be found guilty of homicide in a lesser degree than that charged. So that brings us to a consideration of the elements involved in manslaughter in the first degree. And so far as this case is concerned a person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury to another person he causes the death of that person; or when he, under circumstances evincing an extreme indifference to human life recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

"Serious physical injury" means physical injury which creates a substantial risk of death.

The Court has already instructed you with reference to intent. That is an element involved in the first section of the Statute relating to manslaughter in the first degree which states, "A person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury" - and I have explained "serious physical injury" to you - "to another person, he causes the death of such person."

Now, the other part of the Statute reads, "Or when he, under circumstances evincing an extreme indifference to human life recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person."

Now, in order for the accused to be found guilty of this charge, manslaughter in the first degree, the State must prove beyond a reasonable doubt, first, that the person intended to cause serious physical injury to another person and that he caused the death of such person. That relates to the first part of the Statute that I referred to which involves "intent."

Now, a person may also be guilty of manslaughter in the first degree if the State proves beyond a reasonable doubt, first, that the accused's conduct evinced an extreme indifference to human life; second, that the accused's conduct created a grave risk of death to another person; third, that the accused caused the death of John Keller; and fourth, that the death of John Keller was caused by the reckless conduct of the accused. There's no element of specific intent involved in this section of the Statute relating to manslaughter in the first degree. The gist of the charge is recklessness.

Now, another section of the General Statutes defines "recklessly" as follows: "A person acts recklessly with respect to a result or to a circumstance described by a Statute defining an offense, when he is aware of, and consciously disregards a substantial and unjustifiable risk that such result will occur, or that such circumstance exists." The risk must be of such a nature and degree that disgarding it constitutes a grave, a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

So, it is for you to decide whether or not the State has proven beyond a reasonable doubt, one, that the accused's conduct evinced an extreme indifference to human life; two, that under the circumstances the accused's conduct falls within the definition of recklessness - as the term was explained to you; three, that the conduct created a grave risk of death to another person; and fourth, that the conduct caused the death of John Keller.

If you so find then your verdict must be that the accused is guilty. If you do not so find then your verdict must be that the accused is not guilty under this section of the Statute relating to manslaughter in the first degree. Please keep in mind, in order to find this accused guilty you've got to find, you have to determine that all these elements that the State claims which appear in the wording of the various parts of the

Statutes - for example, "recklessness," "intentionally," et cetera - all those elements have to be proved beyond a reasonable doubt.

Another degree of homicide, which is a lesser degree than murder or manslaughter in the first degree, is manslaughter in the second degree; and under manslaughter in the second degree our law specifies that a person is guilty of manslaughter in the second degree when he "recklessly causes the death of another person."

You will note that in this case, to be found guilty, a person must recklessly cause the death, and the element of intent to cause serious physical injury, conduct evincing extreme indifference to human life, or conduct which creates a grave risk of death are lacking and need not be considered. The Statute merely says that manslaughter in the second degree means that person is guilty of manslaughter when he, "recklessly causes the death of another person."

Keep in mind the distinction between that manslaughter and manslaughter in the first degree.

However, as I have just explained it to you an accused, under the charge of manslaughter in the second degree, to be found guilty of that charge must recklessly cause the death of another person, and I have already explained to you the meaning of the word "recklessly" as found in the Statutes and as described in the Statute.

Now, the defendant has presented - the State's claim as I understand it from the evidence, as I understand it it's the State's claim - and keep in mind it's your recollection that counts, not the lawyers and not mine, yours - the State claims that on this particular case, to state it very succinctly, this accused was beset by domestic problems involving his girlfriend, by financial problems, and that as a result of this he had a bizarre motive for killing John Keller. That is briefly - I say "briefly,"

those are my words - what the State claims; the defendant, on the other hand, claims that he never knew John Keller, and that he shot him because as they rode along there Keller suddenly went for his, went for a so-called Magnum gun and was pointing it toward him, and that he pushed the gun away to eliminate the bullet that he anticipated would come out of that gun hitting him; that he pushed his arm backward, that is, he pushed Keller's right arm backwards away from the line of fire that would have struck him if that would have been a real gun.

He claims that prior to this Keller had evinced a state of depression, calling himself "the devil," and at that time went to grab the gun; that he deflected it. And as I said the State's claim is that this man was beset by so many problems, real or imagined involving the purchase of the Miami Dolphins, and the purchase of the New York Giants, and the promulgation of concerts, and his inability to raise enough money for those concerts, and those matters beset him, and that that's what triggered him off to shoot this man, and that was his motive, i.e., a bizarre motive.

That's, as I understand it, the State's claim. But it is up to you to listen to the State's Attorney, and to listen to the defense attorney and see what conclusion you come to.

Now, the defendant has presented evidence and contends that any homicide of John Keller was justified on the basis of self-defense. Under our law a person is justified in using reasonable physical force upon another person to defend himself from what he reasonably believes to be the use, or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose, except that deadly physical force may not be used unless that person - that is, the defendant - reasonably believed that the other person - that is, John Keller - was using, or about to use deadly physical force or was inflicting, or about to inflict great bodily harm.

"Deadly physical force" means force which can reasonably be expected to cause death or serious physical injury. And "serious physical injury" means physical injury which creates a substantial risk of death.

With reference to that claim of self-defense, and any consideration of that element in this case, in viewing the State's evidence and the evidence offered by the defendant you are instructed that the State has the burden of disproving such defense beyond a reasonable doubt.

Now, the right of self-defense does not arise from a mere apprehension of danger but only from actual or reasonably expected attack. It is the facts as they reasonably appear to the defendant at the time he acted which measure the existence of the right of self-defense.

The question is not merely what the defendant - did the defendant believe? But what did he have a right to believe? Reasonable belief need not rely on facts; appearances may be sufficient. The homicide would be justifiable whether appearances to the defendant proved to be true or false if they were such as to furnish reasonable grounds for the defendant's believing that the other person, John Keller, was using, or about to use deadly physical force or was inflicting, or about to inflict great bodily harm.

As I have stated before you've heard the evidence here with regard to Mr. Maselli's account, which was that Mr. Keller reached over, picked up what he believed was the Magnum, pointed it toward his face, that he pushed it aside and simultaneously practically fired into the head of Mr. Keller. That represents his claim of self-defense, that he feared that that gun - that he claims Mr. Keller had - would have killed him and done him bodily harm.

On the other hand the State disputes this and claims that if that were the case the gun which was thrust back - you saw the demonstration there - having

been hit by Mr. Maselli's arm, would immediately have gone off Maselli's arm, fallen back - or by that time Maselli had already been wounded - it would have fallen elsewhere than where it was found after the shooting, i.e., on the left side of the cab between the driver's seat, that is Keller's seat and the left-hand door.

Now, that is, as I recall, the evidence; it is for you to say as to whether or not you'll accept the version given by the defendant, Mr. Maselli, or the version given by the State.

I might also say on the subject of justification that our Statute states that the State shall have the burden of disproving such a defense beyond a reasonable doubt, which goes back to what I said originally; that throughout the trial the burden is upon the State to prove this case beyond a reasonable doubt.

Now, to reiterate to a certain degree: Although the defendant has been specifically charged with murder, the very nature of this offense is such that it may include the elements of the crime of manslaughter in the first degree, and manslaughter in the second degree. Accordingly, if you find that the proof is not sufficient to justify a conviction of the crime of murder you must consider whether it is sufficient to establish, beyond a reasonable doubt, the crime of manslaughter in the first degree.

Likewise, if you find that the State's proof is not sufficient to justify the conviction of the crime of manslaughter in the first degree you must consider whether it is sufficient to establish, beyond a reasonable doubt, that the defendant is guilty of manslaughter in the second degree.

Of course, if you find the defendant guilty of the more serious crime of murder you need go no further in your deliberation.

Now, to sum up: It's your duty to decide whether the accused is guilty of murder, or manslaughter in the first degree, or manslaughter in the second degree, or whether he is not guilty. If you find the accused committed the crime of murder then your verdict will simply be "Guilty as charged." Your foreperson - I better say that so I won't get into trouble with the ladies, we used to say "foreman" - your foreperson will come in and say, "Guilty as charged."

If you find that instead of murder, the original charge, manslaughter in the first degree was committed your verdict will be guilty of manslaughter in the first degree and it will be so stated to the Court by your foreperson.

If you find that the accused did not commit either murder or manslaughter in the first degree but did commit manslaughter in the second degree your verdict will be, and you will announce it as guilty of manslaughter in the second degree. That will also be stated.

And then if you conclude that the accused did not commit this homicide, murder, manslaughter in the first degree or manslaughter in the second degree, then you will return to this courtroom and through your foreperson state your verdict to be "Not guilty."

Now, as was explained to you by counsel, all the State desires and all the accused desires is a verdict based on the evidence and the law. You must not allow sympathy for either the State or the accused or the witness, or any witnesses, or Mr. Keller, to enter into your deliberations.

You must guard against any chance for sympathy for either the State or the accused to enter into your deliberations. The verdict must be unanimous.

So let me reiterate these final words. If you find that the State has proven all the elements, essential elements of the crime beyond a reasonable doubt your

verdict must be guilty; if you find that the State has not proven all the essential elements of the crime charged beyond a reasonable doubt your verdict should be not guilty.

Ladies and gentlemen, I think that that about concludes my charge, my instructions to you at this time, and I will place this case in your hands for your verdict on the issues involved. You will retire to the jury room and elect a foreperson. And when you are ready to report notify the Sheriff - the Sheriff will be outside the door - and we will return to this courtroom.

Keep in mind that your verdict must be unanimous. Incidentally, all the exhibits introduced here by both sides will be in the jury room for your consideration. And if the time should come when you feel that you want to use the projector to see one of the exhibits - gentlemen, we can make arrangements for that somehow, can't we?

MR. KELLY: I believe so, your Honor.

THE COURT: We will be able to do that.

Now, you may retire.

(Whereupon, at 11:35 A.M., the jury retired to consider their verdict.)